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Supreme Court of the United States

October Term, 1958

No. 950

JOHN W. McGRATH CORPORATION,
Petitioner,

and

THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioner,

against

THOMAS F. HUGHES, Deputy Commissioner, successor to JOHN A. WILLARD in the Second Compensation District of the United States Department of Labor, Bureau of Employees' Compensation,
Respondent,

and

ROSE D'ORNELLAS, Claimant,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions	2
Constitution and Statutes Involved	4
Statement of Facts	4
1. Preliminary Statement	4
2. Evidence Presented at Hearings of Deputy Commissioner	6
(a) Matters at issue and matters not in dispute	6
(b) Evidence presented by claimant Rose D'Ornellas	7
(c) Evidence presented by Deputy Commissioner	8
(d) Evidence presented by petitioners	9
3. The Deputy Commissioner's Findings, Order and Award	10
Argument	11
Conclusion	18
Appendix A—Opinions	19
Opinion of Court of Appeals, Second Circuit on Affirmance	19
Opinion of United States District Court for the Southern District of New York	23
Appendix B—Constitution and Statutes Involved	27
(a) Constitution of the United States, Amendment V	27
(b) The Longshoremen's Act	27
(c) The Administrative Procedures Act	29
Appendix C—Legislative History of Substantial Evidence Test in the Administrative Procedures Act	32

Table of Cases

	PAGE
Associated General Contractors v. Cardillo, 106 F. 2d 327 (D. C. Cir. 1939)	15
Colonna's Shipyard Inc. v. O'Hearne, 200 F. 2d 220 (4th Cir. 1952)	16
Consolidated Edison of New York v. National Labor Relations Board, 305 U. S. 197 (1936)	3, 16, 18
Del Vecchio v. Bowers, 296 U. S. 280 (1935)	14
Hastorf-Nettles Inc. v. Pillsbury, 203 F. 2d 641 (9th Cir. 1953)	16
Interstate Commerce Commission v. Louisville & N.R.R. Co., 227 U. S. 88 (1913)	17
Jeffers v. Foundation Co., 85 F. 2d 24 (2nd Cir. 1936)	11
Jencks v. United States, 353 U. S. 657 (1957)	17
Johnston v. Marshall, 128 F. 2d 13 (9th Cir. 1942), cert. denied 317 U. S. 629 (1942), rehearing denied 318 U. S. 799 (1943)	11
National Labor Relations Board v. Amalgamated Meat Cutters, 202 F. 2d 671 (9th Cir. 1953)	4, 17
O'Leary v. Brown-Pacific Maxon, Inc., 340 U. S. 504 (1951)	15, 16
Smith & Son v. Taylor, 276 U. S. 179 (1928)	11
State Industrial Commission v. Nordenholt Corp., 259 U. S. 263 (1922)	11
Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474 (1951)	15, 16
Willapoint Oysters v. Ewing, 174 F. 2d 676 (9th Cir. 1949	4, 17

Constitution and Statutes

Constitution of the United States, Amendment V	17
Administrative Procedures Act	3, 4, 5, 13, 14, 15, 16, 17, 18
Longshoremen's Act	2, 3, 4, 5, 11, 13, 14, 15, 16, 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John W. McGrath Corporation and The Fidelity & Casualty Company of New York, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated and entered in the above entitled case on March 2, 1959.

Citations to Opinions Below

The Opinion of the United States Court of Appeals on affirmance of the judgment of United States District Court for the Southern District of New York, printed in Appendix A, pages 19-22, *infra*, is reported in 264 F. 2d 314.

The Opinion of the United States District Court for the Southern District of New York granting the motion of defendant Deputy Commissioner John A. Willard for summary judgment [illegible] printed in Appendix A, pages 23-26, *infra* has not yet been reported.

Jurisdiction

The Judgment sought to be reviewed was final in nature and was filed in the United States Court of Appeals for the Second Circuit with its Opinion and was entered on March 2, 1959. Although the questions presented to that court for review plainly concerned themselves with whether incompetent hearsay was substantial evidence enough to support essential administrative findings, that Court's Opinion by indirection only and without expressly conceding that any administrative findings were supported by hearsay alone,* has actually answered in the affirmative; and in these circumstances, no application was made for rehearing.

A certified copy of the Judgment of the United States Court of Appeals for the Second Circuit is attached to and constitutes part of the Certified Record. The time for filing this petition is computed from this Judgment entered March 2, 1959, and 90 days therefrom is May 31, 1959.

The jurisdiction of this Court is invoked under 28 United States Code Section, Section 1254 (1).

Questions

1. Was the Court of Appeals in error in contending that there was some evidence beyond the hearsay of the deceased employee D'Ornellas and the double hearsay attributed to another person to support the findings of the Deputy Commissioner that were essential to support his order and award, to wit, the findings of "navigable waters" jurisdiction under the Longshoremen's Act and of an "accidental injury arising out of and in the course of employment"? **

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* The Opinion of the Court of Appeals, however, will concede: "Perhaps this is not the result we would have reached had the case come before us de novo * * *."

** The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927) codified in 33 U. S. Code Section 901 *et seq.*; here referred to as the Longshoremen's Act, requires for a compensation award that the jurisdiction situs of the injury be upon navigable waters and that the injury arises out of and in the course of employment. See page 12, *infra* and Appendix B, pages 27-29.

2. If there was additional evidence beyond the hearsay of the deceased D'Ornellas and the double hearsay of another person to support these necessary findings of the Deputy Commissioner, was this additional evidence anything more than the barest scintilla which should be disregarded under the "substantial evidence" standard of the Administrative Procedures Act?

3. If there was no additional evidence beyond the hearsay of the deceased D'Ornellas and the double hearsay of another person to support the findings of the Deputy Commissioner, were his findings justified because of the presumption that a claim comes within the provisions of the Longshoremen's Act?*

4. When essential administrative findings are in reality supported only by incompetent hearsay and there is circumstantial evidence to the contrary, can a Deputy Commissioner properly make a compensation order and award in favor of a claimant in the light of the requirement of Administrative Procedures Act that such order be supported by "substantial evidence" upon a review of the record as a whole?

5. Does not the rule of *Consolidated Edison of New York* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1936), suggesting that under the constitutional standard of "due process" mere uncorroborated hearsay or rumor is not substantial evidence to support an administrative finding, which rule was expressly approved during the passage of the bill for an Administrative Procedures Act,** require that in this case the order and award of the Deputy Commissioner must be set aside?

6. Is the rule actually applied by the United States Court of Appeals for the Second Circuit to this case, to wit, that an administrative order and award is supported by

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* U. S. Code Section 903(a) provides for such a presumption. See Appendix B, page 28.

** See Appendix C, page 37, *infra*.

substantial evidence although the administrative findings of "navigable waters" jurisdiction and of an "accidental injury arising out of and in the course of employment" are really based upon bare hearsay, to be preferred to the rule of the United States Court of Appeals for the Ninth Circuit * that, to be supported by "substantial evidence", an administrative order and the administrative findings thereunder must be supported by more than uncorroborated hearsay?

Constitution and Statutes Involved

Amendment V of the Constitution of the United States; the portions of the Administrative Procedures Act, 60 Stat. 236 (1946), which are codified as Title 5, U. S. Code, Sections 1001(a) and (b), 1004(b), 1006(c), 1009(a) and (e) and 1011; the portions of the Longshoremen's Act, 44 Stat. 1424 (1927) which are codified as Title 33 U. S. Code, Sections 902(2), 903(a), 919(c) and (d), 920, 921(a) and (b), and 923(a). The texts of these are set out in Appendix B hereto, pages 27-31.

Statement of Facts

1. Preliminary Statement

The judgment of the United States Court of Appeals for the Second Circuit to be reviewed, affirmed the judgment of the United States District Court for the Southern District of New York dismissing the complaint of John W. McGrath Corporation and The Fidelity & Casualty Company of New York. The judgment of the United States District Court was entered upon an order granting the motion of defendant John A. Willard then Deputy Commissioner of the Second Compensation District of the

* *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691 (9th Cir. 1949); *National Labor Relations Board* v. *Amalgamated Meat Cutters*, 202 F. 2d 671, 673 (9th Cir. 1953).

United States Department of Labor, Bureau of Workmen's Compensation.

The complaint filed April 4, 1957 by John W. McGrath Corporation and The Fidelity & Casualty Company of New York in this action had sought judicial review of the compensation order and award made by Deputy Commissioner John A. Willard in favor of Rose D'Ornellas, a claimant for compensation under the Longshoremen's Act as a widow of John D'Ornellas, deceased employee of petitioner John W. McGrath Corporation. The complaint alleged that said order and award and findings thereunder were erroneous and unsupported by substantial evidence and prayed that the order, award and findings be set aside and that other resonable relief be granted. Said compensation order and award was judicially reviewable under both the Longshoremen's Act * and the Administrative Procedures Act**. Claimant Rose D'Ornellas had also been named in the complaint as a party defendant but although served in this action never appeared either in the United States District Court for the Southern District of New York or in the United States Court of Appeals for the Second Circuit.

Inasmuch as John A. Willard was replaced as Deputy Commissioner in the Second Compensation District of the United States Department of Labor after appeal was taken to the United States Court of Appeals for the Second Circuit, his successor in that Compensation District, to wit, Deputy Commissioner Thomas F. Hughes was substituted as defendant Deputy Commissioner by order of the United States Court of Appeals for the Second Circuit.

The question of whether the order, award and findings of the Deputy Commissioner were erroneous and unsupported by substantial evidence as alleged in the complaint of petitioners makes it necessary to survey the evidence presented at the hearing before the Deputy Commissioner.

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* 33 U. S. Code Section 921(b), Appendix B, page 28.

** 5 U. S. Code Section 1009(a)(e), Appendix B, pages 30-31.

2. Evidence Presented at Hearings of Deputy Commissioner *

a) *Matters at issue and matters not in dispute.*

It was undisputed that John D'Ornellas, employee of petitioner McGrath Corporation whose duties were generally of a light nature as a sweeper and cleaner, collapsed at 8:45 A. M. on Monday, January 17, 1955 from a myocardial infarction while distributing coffee to his co-workers on Pier 9, North River, and was then taken to Beekman-Downtown Hospital and that 47 days later, after a period of convalescence following his discharge from the hospital, he died on March 5, 1955 as a result of myocardial infarction.

Petitioners disputed the following contentions of claimant Rose O'Ornellas which were adopted in the findings of the Deputy Commissioner, to wit, that John D'Ornellas was injured on or about Friday, January 14, 1955, at 3 P. M. when "while standing on a lighter at Pier 9, pulling the lighter by a line unassisted, he suffered unusual strain accompanied by a severe pain in the upper chest resulting in a coronary thrombosis which precipitated the myocardial infarction."

It is petitioners' contention that D'Ornellas was not on a lighter and was not pulling on a line on or about Friday, January 14th, but that he had been suffering extensive chest pain leading up to the myocardial infarction *throughout the week from January 10th to January 17th, 1955.*

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* Reference in this section of the Statement of Facts is made to the portions of the Record supporting the statements made herein. For example reference is made to the pages of the certified appendix filed in the Court of Appeals such as "(12a)"; to pages of the transcript of the hearing before the Deputy Commissioner annexed to that certified appendix such as (T12). to page numbers of the Deputy Commissioner's Exhibit as handed up to the Court of Appeals such as (Dep. Comr's. Ex. pp. 2, 4) and to other exhibits handed up to the Court of Appeals by letter or number, such as (Ex. 2).

b) *Evidence presented by claimant Rose D'Ornellas.*

Rose D'Ornellas testified that she was a nurse's aid (T9) who kept a bottle of nitroglycerine at home (T10) for her husband's chest pains (T8); that on Thursday, January 13th or Friday, January 14th, 1955, her husband John D'Ornellas came home looking terrible, and told her he had felt a chest pain while on a lighter pulling a line (T5-7); and that she kept him in bed from that time until the following Monday, taking time off to take care of him (T7). She also testified that *D'Ornellas was sick every night when he came home* (T7).

Dr. Texon testified that on January 22, 1955 John D'Ornellas told him of helping to pull a barge around a pier January 13th when he felt a severe chest pain (T22) but that he (Texon) had no information as to whether D'Ornellas was on a lighter at that time (T24). D'Ornellas told him that during his visit to the diabetic clinic of Kings County Hospital *on Monday January 10, 1955 he complained of numbness in his right arm and the right side of his chest* (T22).

Over objection (T16-19) a paper signed E. Kinnally dated May 27, 1955 was put in evidence, and it stated that Edward Canelli heard unidentified workers say that D'Ornellas had a heart attack on a lighter on January 14, 1955 and that he (Canelli) saw D'Ornellas later that day when he was able to walk (Ex. 2). Claimant's counsel said E. Kinnally was deceased (T18). The body of writing on that paper, which referred to the signatory as Edward Canelli was apparently written by some one other than the "E. Kinnally" who signed the paper (Ex. 2). The person who prepared the report set out on that paper—presumably an investigator who had been in the employ of claimant—was never produced at the hearing.

Dr. Cutler, claimant's medical expert on cross examination testified in effect that *a myocardial infarction which develops from a coronary thrombosis could be a "spon-*

taneous occurrence" (T80; T84-85). Upon direct examination he had testified in effect that if on January 13th or 14th D'Ornellas was pulling a rope and felt severe chest pain *for the first time*, this was related to the coronary thrombosis and myocardial infarction in D'Ornellas diagnosed following the collapse on January 17th and to the later death of D'Ornellas from arteriosclerotic heart disease (T74-78).

Claimant did not identify "Angie", the alleged foreman to whom, according to the claim of D'Ornellas placed in evidence (Ex. 1), he reported his injury "at once" on January 14, 1955. Claimant produced no one at the hearing who witnessed the alleged injury.

c) Evidence presented by Deputy Commissioner.

The Deputy Commissioner placed in evidence the hospital records of both Kings County Hospital where D'Ornellas was case No. 17504 and Beekman Downtown Hospital, as a single exhibit (Dep. Com'rs. Ex.).

These records indicated D'Ornellas was a diabetic and cardiac (Dep. Comr's. Ex. p. 1); that in 1951 it was discovered on X-ray that D'Ornellas had an arteriosclerotic heart (Dep. Comr's. Ex. p. 14); that he had visited the diabetic clinic of Kings County Hospital for nearly four years before his collapse (Dep. Comr's. Ex. p. 12); *that he complained of pain in his right chest and arm at Kings County Hospital on Monday, January 10, 1955* (Dep. Comr's. Ex. p. 11).

Portions of the records of Beekman Downtown Hospital where D'Ornellas was admitted immediately after his collapse on Monday, January 17th some three days after the alleged line-pulling incident, are significant since they confirm the fact that the chest pains of D'Ornellas antedated January 14th and that he had easy porter work on the company pier.

The admission sheet of January 17, 1955 states:

> "This 60 year old white male comes in to the Hospital complaining of *chest pain radiated to his right arm of one week duration.* Pt. states he took nitroglycerin which did not stop the pain * * * " (Dep. Comr's. Ex. p. 2).

A note of Dr. Shalsa in the continuation sheet reads:

> "Patient is a known diabetic complaining about chest pain—and numbness in the lateral chest side and right arm. *Chest pain for about one week* * * * " (Dep. Comr's. Ex. p. 4).

The continuation sheet contains a further entry:

> "2/4/55 Patient does not want convalescent care unless there is a medical necessity. He lives with his wife—a nurse—employed at Kings County Hospital—and he feels she can provide necessary care. *There is the problem of three flights of stairs* but he has indicated that once he gets home he can manage. *Although listed as a longshoreman his work he describes as easy porter work on the company pier an assignment following an injury on the job several years ago.*
>
> R. S. WINSLOW,
> Soc. Ser."

(Dep. Comr's. Ex. pp. 4-5).

d) *Evidence presented by petitioners.*

Although claimant did not identify "Angie", Andrew Bonowski, hiring agent or foreman of petitioner McGrath Corporation on Piers 9, 10 and 11, testified that *no one* told him D'Ornellas had an accident on the job (T59), that if D'Ornellas was down near a lighter he would have known it (T61).

The extra labor foreman of petitioner McGrath Corporation on Pier 9 would have to pass on an assignment to pull ropes on a lighter (T27). William Fixor extra labor foreman on Pier 9 testified that he had no knowledge of

the incident D'Ornellas claimed (T44), that if D'Ornellas had been pulling a barge as claimed "most possibly" he would have seen him, that D'Ornellas did not complain to him of pulling a barge and getting a chest pain (T45).

Richard McGrath, pier superintendent for Pier 9 and George Lucus, pier superintendent for Piers 9, 10 and 11, testified in effect that they would have known it if D'Ornellas had been on a lighter pulling a line (T40, T43; T68, T70, T72-73).

The testimony of all the above supervisory officials was that D'Ornellas was a sweeper in the office area at the head of Pier 9 (T26, T44, T55, T65), and that the orders on Pier 9 were that D'Ornellas was to have light work only (T28, T45, T61, T68-69). D'Ornellas in an earlier period had worked as a longshoreman but had been reassigned to light work as a sweeper because he was injury-prone (T27-28; T65-66).

Petitioners' medical expert, Dr. Texon, testified that exertion played no significant role in the development of a thrombosis or an occlusion (T92).

3. The Deputy Commissioner's Findings, Order and Award

The Deputy Commissioner found that the duties of John D'Ornellas as an employee of petitioner McGrath Corporation "were generally of a light nature as a sweeper and cleaner". Against the contentions of petitioners however, he found that D'Ornellas was injured on or about 3 P. M. when "while standing on a lighter at Pier 9, pulling the lighter by a line unassisted, he suffered unusual strain accompanied by severe pain in the upper front chest resulting in a coronary thrombosis" which precipitated myocardial infarction from which his death followed. Upon his findings he made his order and award of a fee to claimant's attorney and continuing bi-weekly payments to claimant Rose D'Ornellas. The order was made March 6, 1957. The

complaint seeking review of said order was filed in the United States District Court for the Southern District of New York on April 4, 1957.

Argument

New York compensation law has application to workmen's injuries arising out of and in the course of employment so long as they occur upon a pier as opposed to navigable waters. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Smith & Son* v. *Taylor*, 276 U. S. 179 (1928). By the very language of the Longshoremen's Act, there is no jurisdiction to award federal compensation unless the injury occurs upon navigable waters *and* no state compensation act applies, 33 U. S. Code Section 903(a). Under no circumstances, therefore, is there any right to compensation under the Longshoremen's Act if the injury arising out of and in the course of employment occurs on a pier. *Johnston* v. *Marshall*, 128 F. 2d 13 (9th Cir. 1942), cert. denied 317 U. S. 629 (1942), rehearing denied 318 U. S. 799 (1943); cf. *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (2nd Cir. 1936).

The only person whom claimant can identify as an observer of the situs of the alleged line pulling incident is the deceased employee John D'Ornellas. The Opinion of the Court of Appeals suggests that there is corroboration of the hearsay declarations of this deceased employee as to the situs of his alleged injury on or about Friday January 14th, by reason of the *double* hearsay attributed to Edward Kinnally (or Canelli) to the effect that he did not see such an incident, but heard others whose names he cannot remember, talk of it. This supposed corroboration is of course the flimsiest sort of evidence, mere rumor or hearsay upon hearsay.

The evidence to support the claim that D'Ornellas was involved in a line-pulling incident involving injury at work

anywhere, is just as weak as that which would place such an incident upon navigable waters so as to give it a jurisdictional situs. Here again the only person whom claimant can identify as an observer of a line-pulling incident is the deceased employee; and in reality the *double* hearsay of Kinnally (or Canelli) is the only semblance of corroboration.

To be sure, D'Ornellas claimed more than once that he had been pulling a line fastened to a lighter, on a Thursday or Friday. The fact that this injury-prone workman (who no doubt was familiar with the ins and outs of compensation proceedings) told somewhat differing accounts about pulling a line * does not make his claim any less self-serving and incompetent hearsay, or any more credible. In reality it is corroboration neither of the incident nor its situs.

While the Opinion of the Court of Appeals also tries to find corroboration "in a lesser degree" in the fact that D'Ornellas came home sick on a Thursday or a Friday, this bit of evidence has no significance at all since D'Ornellas had been suffering pains in his right chest and arm *for some three days before the Thursday in question* and claimant Rose D'Ornellas admitted that her husband *was sick every night when he came home.* Furthermore, upon cross-examination, claimant's medical expert conceded that a coronary thrombosis can be a spontaneous occurrence without extraordinary effort (T84-85) so that chest pains are not reliable indicia of exertion. Then again, even if chest pains could be attributed to an exertion, there is no reason to assume the exertion occurred at work—perhaps climbing up the three flights of stairs in his own apartment building would be sufficient exertion—or to assume the exertion took place upon navigable waters instead of land.

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* D'Ornellas allegedly told his wife *he started waving his hands* when he felt the chest pain after pulling (T6) but he told Dr. Texon that when the pain came he stopped work and rested (T22).

According to his claim (Ex. 1), D'Ornellas was pulling all by himself but he told Dr. Texon he was helping to move a barge (T22).

To Beekman-Downtown Hospital authorities, however he described his work as "easy porter work" (Dep. Com's Ex. pp. 4-5).

Finally, in spite of the contrary view of the Court of Appeals, the testimony of George Lucas to the effect that it was not unusual to have a stevedore on a lighter pulling a barge was not corroboration for the proposition that the deceased D'Ornellas performed such an assignment. Lucas testified that it was *very unusual* (T72), and *not probable* (T73) that the deceased was so employed. Claimant Rose D'Ornellas conceded that D'Ornellas was regularly employed as a sweeper not as a longshoreman during this period (T12-13). The Beekman-Downtown Hospital records note that although listed as a longshoreman, D'Ornellas described his work as "easy porter work on the company pier an assignment following an injury on the job several years ago."

Certainly whatever evidence beyond incompetent hearsay which the Opinion of the Court of Appeals would claim to be corroborative * could not by any stretch of reasoning be regarded as more than a scintilla and thus by the legislative intent manifest in the history of the Administrative Procedures Act, it should be disregarded.**

At the outset of the administrative proceedings there was a presumption that the claim was properly brought under the Longshoremen's Act.*** This presumption had disappeared however after the Deputy Commissioner had put in evidence the hospital records, and petitioners presented their testimony to the effect that D'Ornellas although a longshoreman in an earlier period, had been reassigned to light work as a sweeper because he was injury

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* The District Court in its opinion attempted to find corroboration in the fact that Dr. Texon repeated to petitioner John W. McGrath Corporation what John D'Ornellas had said, without adding a skeptical comment. Yet this medical expert was examining into the physicial condition of D'Ornellas and not his veracity. Since Dr. Texon was not trying the facts his unexpressed hearsay opinion on the latter subject was irrelevant as well as incompetent.

** See Appendix C, pages 34-35, 37-38.

*** 33 U. S. Code Section 920, Appendix B, page 28.

prone, that the orders were that he was to have light work only, that he was a sweeper in the office area at the head of Pier 9, and that they had no knowledge of his pulling a line as claimed.* The only office of this presumption is to control when there is an entire lack of competent evidence, *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286 (1935).

By reason of the presumption, petitioners had the burden of coming forward with some evidence to *negative* the contentions presented by claimant but could not reasonably be expected to produce positive and direct testimonial evidence denying claimant's contentions. Of necessity the evidence presented by petitioners was circumstantial, but it was sufficient to meet the burden. The Deputy Commissioner found that the duties of D'Ornellas "were *generally* of a light nature as a sweeper and cleaner" (11a). Thus without considering the incompetent and uncorroborated hearsay of D'Ornellas and Kinnally (or Canelli), even the Deputy Commissioner would have ascribed more than 50% probability to the proposition that D'Ornellas was *not* pulling a line, as claimed.

The ultimate questions of law in this case therefore concern themselves with whether administrative findings can properly be made of "navigable waters" jurisdiction and of "an accidental injury arising out of and in the course of employment" under the Longshoremen's Act and the Administrative Procedures Act, when these findings are supportedly solely by incompetent hearsay evidence and there is circumstantial evidence to the contrary.

In proceedings under the Longshoremen's Act before December 11, 1946, the effective date of the Administrative Procedures Act **, a Deputy Commissioner was able to apply a mechanical test in determining where the statements of a deceased employee concerning his injury could be received

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* See pages 9-10, *supra*.

** See Section 12 of the Administrative Procedures Act, 5 U. S. Code Section 1011 set out in Appendix B, page 31.

in evidence to establish the injury. The Longshoremen's Act provided:*

> "* * * Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury. * * *"

Whatever may have constituted sufficient mechanical corroboration in the administrative proceedings before December 11, 1946, the rule now is that the sum total of evidence in support of an order must be "reliable, probative and substantial evidence" ** and that administrative findings shall be set aside if "unsupported by substantial evidence" upon a review of the whole record,*** *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951). The Administrative Procedures Act on its face applies to proceedings under the Longshoremen's Act and this Court has so ruled, *O'Leary* v. *Brown-Pacific Maxon, Inc.*, 340 U. S. 504 (1951), so that the older cases dealing with the question of what is sufficient corroboration, such as *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327 (D. C. Cir. 1939), should no longer have value as precedents.

A detailed legislative history of the Senate bill for an Administrative Procedures Act **** which finally became law in 1946, is presented in Appendix C to this petition. This legislative history makes it clear that Congress, in setting up the standard of "substantial evidence" for administrative orders and findings intended that these should be supported by more than incompetent hearsay, and by

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* 33 U. S. Code Section 923(a), Appendix B, page 29.

** 5 U. S. Code Section 1006(e), Appendix B, page 30.

*** 5 U. S. Code Section 1009(e), Appendix B, pages 30-31.

**** The Senate Bill (S. 7) was introduced at the 79th Congress, 1st Session.

more than a scintilla of competent evidence.* The accepted standards of proof as distinguished from mere admissibility of evidence were intended by the words "substantial evidence", to govern in administrative proceedings in the same way as they do in Courts of law and equity.** In reviewing administrative orders and findings under the Administrative Procedures Act, courts were asked to exercise their independent judgment upon a review of the record as a whole, and not approve the administrative order or finding merely because there was some evidence to support it,*** *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 487-488 (1951). Finally the rule of *Consolidated Edison of New York* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1936) to the effect that mere uncorroborated hearsay or rumor does not constitute substantial evidence to support administrative findings, received express approval on the floor of the House during its consideration of the Senate Bill.****

The full impact of the evidentiary standards of the Administrative Procedures Act upon the Longshoremen's Act has never been definitively stated by this Court and there is confusion among the Circuits. In *Colonna's Shipyards Inc.* v. *O'Hearne*, 200 F. 2d 220 (4th Cir. 1952), the Fourth Circuit obviously made the "independent judgment" called for in the House Report upon Section 10(e) of the bill for an Administrative Procedures Act, and approved by this Court in the *Universal Camera* case. Other circuits however have deemed they have no right of independent judgment of Longshoremen's Act orders and findings because of language used by this Court in *O'Leary* v. *Brown-Pacific Maxon Inc., supra*, e.g., *Hastorf-Nettles Inc.* v. *Pillsbury*, 203 F. 2d 641, 643 (9th Cir. 1953). Indeed the Second Circuit in this case has conceded:

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* See Appendix C, pages 34-35, 37-38.
** See Appendix C, pages 32, 36.
*** See Appendix C, pages 33, 36-37.
**** See Appendix C, pages 35, 37.

"Perhaps this is not the result we would have reached had the case come before us de novo * * *"

Logically however, the evidentiary standards of the Administrative Procedures Act should apply in Longshoremen's Act proceedings in the same way that they apply to all other administrative proceedings.

The usual reason for affirming the findings of the trier of fact upon a judicial review is that the trier of fact can best resolve the questions as to credibility because he can observe the witnesses who are giving testimony. Here however the Deputy Commissioner actually made his findings upon the statements of persons who were not before him. Is there any reason to inhibit independent judgment in such circumstances?

The specific rule *applied* by the Court of Appeals for the Second Circuit in the instant case is in direct conflict with the rule of the Ninth Circuit to the effect that an administrative order and the administrative findings thereunder must be supported by something more than uncorroborated hearsay. *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691 (9th Cir. 1949); *National Labor Relations Board* v. *Amalgamated Meat Cutters*, 202 F. 2d 671, 673 (9th Cir. 1953).

The common law rules restricting the admission of hearsay evidence are grounded on the fact that the admission of hearsay involves a denial of cross-examination. It would appear that this Court was long of the opinion that there was a failure of due process under the Fifth Amendment not only when cross examination was denied in administrative proceedings but also when administrative findings were based solely upon incompetent hearsay. *Interstate Commerce Commission* v. *Louisville & N.R.R. Co.*, 227 U. S. 88, 91-93 (1913); *Consolidated Edison of New York* v. *National Labor Relations Board*, *supra*. Of late this Court has shown zealous concern lest in criminal cases the right of cross examination be unreasonably abridged, *Jencks* v. *United States*, 353 U. S. 657 (1957). It should appear that

questions as whether administrative orders and findings may validly be made under the Administrative Procedures Act upon uncorroborated incompetent hearsay evidence should also be a matter of continuing national concern.

To the knowledge of your petitioners, this Court has not expressed itself on the general subject matter of the propriety of administrative orders and findings supported only by uncorroborated hearsay or rumor, since its decision in the *Consolidated Edison* case twenty-one years ago. With the passage of the Administrative Procedures Act during that interval, it should be eminently appropriate for this Court, in view of the differing treatment of administrative findings supported only by naked hearsay in two Circuits, to restate its rule on this subject matter in a case involving the Longshoremen's Act.

CONCLUSION

For the foregoing reasons, petitioners should be granted a writ of certiorari in this case.

Respectfully submitted,

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